PAUL MURUGESU A/L PONNUSAMY SEBAGAI WAKIL NALAMAH A/P SANGAPILLAY (P) (SIMATI)

v.

CHEOK TOH GONG & 4 ORS.

SUPREME COURT, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN CJ (MALAYA)
DATO' PEH SWEE CHIN FCJ
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH FCJ
[CIVIL APPEAL NO. 02-424-93]
10 FEBRUARY 1996

CONTRACT: *Agreement - Sale and purchase agreement - Variation of terms - Validity - Necessary prerequisites - Whether there must be consensus ad idem - Variation by conduct - Consent - Mere knowledge of variation - Whether could amount to consent - Standard of proof - Evidence Act 1950 s. 92.*

CONTRACT: *Agency - Implied agency - Son doing an act in connection with parent's business - Whether necessarily an agent of the parent.*

EVIDENCE: *Inference - Inference from facts - Whether to be distinguished from facts specifically found - Position of original tribunal in respect to inferences from facts - Whether having any advantage over Judges of appellate Court - Whether in no better position.*

LAND LAW: *Sale and purchase of land - Sale of undivided share in part of land - Transfer - Registration - National Land Code s. 214.*

By an agreement dated 6 October 1972, the first and second respondents (the vendors) sold to one Nalamah (the purchaser) a piece of land known (lot 10) for RM9,000. Lot 10 however was only a portion of a bigger parcel of land comprised in lot 1493. The purchaser paid a deposit of RM3,600, and by clause 3 of the agreement, was obliged to pay the balance sum of RM5,400 on or before the completion date, i.e."within14 days of the date of the receipt by the purchaser of a *notice in writing* from the vendors that the main title deed to the said land held under lot 1493 has been issued".

The vendors alleged breach of clause 3 by the purchaser and in consequence the agreement was terminated and lot 10 was sold to the 5th respondent. The upshot of this was that, the purchaser filed Civil Suit No. 385/82 and by that claimed specific performance of the agreement, and a declaration that a trust deed dated 24 May 1982, in so far as it relates to lot 10 as being held in trust for the 5th respondent, was null and void. The claim was dismissed by the learned Judge who ruled that the purchaser had varied the terms of clause 3 by accepting an oral notice in lieu of the written notice, and that she was

indeed in breach of the clause for not paying the RM5,400 balance price. Accordingly, a caveat which the purchaser had lodged against lot 10 was ordered removed.

The facts showed that on 5 October 1981, when the purchaser was still alive, her son, the substituted appellant here (the son), received an oral message from a third party, apparently sent for by the vendors, that the title deed to lot 1493 had been obtained. On the same day, the son gave a cheque for RM5,000 to the vendors, purportedly to satisfy the balance sum for lot 10 as spelt out in clause 3. The son, however, was told by the vendors' lawyer that the title to lot 1493 was still in the process of being transferred to the vendors, and that being the case, the next day, payment of the cheque was stopped by the son. According to the son, he was instructed by the mother to stop the payment, and one of the reasons being that no notice in writing pursuant to clause 3 was forthcoming from the vendors. No evidence was adduced that on that 5 October 1981, the purchaser herself was asked to pay the balance price.

Before the Court of Appeal, the question that arose was whether in the circumstances the trial Judge's conclusion was erroneous, and in any case, whether the mother purchaser, or the son, by their conduct, had varied the terms of clause 3, such that the requirement of *"a notice in writing"* therein had been dispensed with.

Held:

Peh Swee Chin FCJ (delivering the judgment of the Court):

[1] The agreement of 6 October 1972 is not of those excepted cases spoken of in s. 92(d) of the Evidence Act 1950. Therefore, both parties are entitled to vary any term of the agreement, in writing, or orally where oral evidence of such variation can be given.

[2] Where variation by conduct is sought to be proved, it must be shown that not only that the variation is understood by the parties but also that they both intended to be bound by it. The variation to clause 3, thus, must be understood by the purchaser and the vendors, and they must also intend to be bound by it.

[3] A distinction has to be made between the finding of a specific fact and a finding of fact which really is an inference drawn from facts specifically found. In connection with inferences from facts specifically found, the original tribunal trying the case is in no better position to decide than the Judges of the appellate Court.

[4] If the mother had really asked the son to stop payment of the cheque on 6 October 1981, i.e a day after the issuance of the cheque, the clear inference is that she had not authorized the son to issue the said cheque.

From the facts, it can be inferred that after the son informed his mother of what had happened, his mother disagreed with such oral notice to be in place of a 14 day's written notice.The Court below, clearly, had failed to apply its mind to these inferences.

[5] The evidence on the whole is more probable with the son issuing the cheque on 5 October 1981, and subsequently visited the clerk of the vendors and the vendors' lawyer without first consulting his mother. And when the mother was consulted later that day after the visits, more probably she had refused to be bound by such variation of clause 3 and asked her son to stop payment on the checque instead on the following day. The purchaser thus had understood the variation the vendors had in mind but she had not intended to be bound by it. There was consequently no *consensus ad idem* about the variation of clause 3 of the agreement.

[6] There being no *consensus ad idem* the purchaser could still fall back on clause 3 in its original form. It follows that there was no breach of the said clause 3, as the obligation to pay the balance price has not arisen prior to the receipt of the written notice described in that clause. This being the case, the Court below was also wrong in removing the purchaser's caveat.

[7] Although it is possible that the son could act as agent for his mother, it would be too far off the mark to lay down as a proposition of law that a son, doing any act in connection with his parent's business, would bind his parent as principal. Nonetheless, the issue of the cheque by the said son could point to a *prima facie* evidence of agency if the mother has ratified it subsequently in writing or by conduct. The evidence, however, points to the contrary.

[8] Under s. 214 National Land Code, only the whole but not part only of any alienated land shall be capable of transfer. The vendors, however, can transfer an undivided share of the said document of title covering lot 1493 representing the said 1.5 acres of the said lot 10 to the purchaser and the rest of the said lot 1493 to themselves at the same time, so that the undivided share of lot 1493 in respect of lot 10 will be registered in the name of the purchaser.

[Appeal allowed. Specific performance of agreement and other consequential orders granted]

***[Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Perjanjian - Perjanjian jual beli - Perubahan terhadap terma - Keesahan - Syarat-syarat - Samada perlu ada consensus ad idem - Perubahan melalui tingkah laku - Persetujuan - Pengetahuan semata-mata tentang perubahan - Samada merupakan persetujuan - Standard bukti - Akta Keterangan 1950 s. 92.*

KONTRAK: *Agensi - Agensi tersirat - Anak membuat sesuatu berhubung dengan hal ehwal ibubapa - Samada semestinya menjadi agen kepada ibubapa.*

KETERANGAN: *Andaian - Andaian daripada fakta - Samada berbeza dari rumusan fakta yang dibuat secara khusus - Kedudukan tribunal duluan berhubung andaian daripada fakta - Samada mempunyai kelebihan berbanding Hakim di Mahkamah rayuan - Samada kedudukannya sama sahaja.*

UNDANG-UNDANG TANAH: *Jual beli tanah - Penjualan kepentingan tak berbelahbagi bagi sebahagian daripada tanah - Pindahmilik - Pendaftaran - Kanun Tanah Negara s. 214.*

Melalui perjanjian bertarikh 6 Oktober 1972, responden pertama dan kedua (penjual) telah menjual sebidang tanah (lot 10) kepada seorang Nalamah (pembeli) dengan harga RM9,000. Lot 10 adalah sebahagian dari bidang tanah yang lebih besar dikenali sebagai lot 1493. Pembeli telah membayar pendahuluan sebanyak RM3,600, dan mengikut fasal 3 perjanjian, adalah bertanggungan untuk menjelaskan bakinya berjumlah RM5,400 pada atau sebelum tarikh penyempurnaan, ia itu, "dalam masa 14 hari dari tarikh pembeli menerima *notis bertulis* dari penjual bahawa surat hakmilik kepada tanah yang dipegang dibawah lot 1493 telah dikeluarkan".

Penjual menyatakan bahawa telah berlaku pengingkaran terhadap fasal 3 dan dengan itu bertindak menamatkan perjanjian dan seterusnya menjual lot 10 kepada responden kelima. Akibatnya, pembeli memfailkan Guaman Sivil No. 385/82 malalui mana beliau menuntut pelaksanaan spesifik perjanjian, dan deklarasi bahawa suratcara amanah bertarikh 24 Mei 1982, setakat mana ianya merujuk kepada lot 10 sebagai amanah yang dipegang untuk kebajikan responden kelima, adalah tak sah dan batal. Tuntutan ini telah ditolak oleh yang arif Hakim yang memutuskan bahawa pembeli telah mengubah terma fasal 3 dengan menerima notis lisan sebagai ganti notis bertulis, dan juga telah melakukan ingkar kerana gagal membayar baki harga yang berjumlah RM5400 itu. Berikutnya, perintah diberikan supaya kaveat yang dimasukkan oleh pembeli terhadap lot 10 ditarik keluar.

Fakta menunjukkan bahawa pada 5 Oktober 1981, sewaktu pembeli masih hidup, anaknya, ia itu perayu gantian di sini (si anak), telah menerima satu pesanan lisan daripada orang ketiga, yang dihantar oleh penjual, menyatakan bahawa surat hakmilik bagi lot 1493 telah pun diperolehi. Pada hari yang sama si anak telah menyerahkan sekeping cek bernilai RM5,000 kepada penjual bertujuan untuk menjelaskan baki harga lot 10 sepertimana yang diperuntukkan oleh fasal 3. Si anak, bagaimanapun, telah diberitahu oleh peguam penjual bahawa pada waktu itu kedudukannya ialah usaha sedang dibuat untuk memindahmilik lot 1493 kepada penjual. Dalam keadaan sedemikian, pada keesokan harinya, si anak telah menahan pembayaran cek berkenaan. Menurut

si anak, penahanan pembayaran tersebut dibuat atas arahan ibunya, iaitu pembeli, dan diantara sebab-sebabnya ialah kerana notis bertulis seperti kehendak fasal 3 telah tidak diberikan oleh penjual. Tiada keterangan dibangkitkan untuk menunjukkan bahawa pada 5 Oktober 1981 itu pembeli sendiri diminta untuk menjelaskan baki harga lot 10.

Di hadapan Mahkamah Rayuan soal yang timbul ialah samada dalam halkeadaan kes, yang arif Hakim perbicaraan telah tersilap dalam rumusan yang dibuatnya, dan apa pun halnya, samada si ibu pembeli, atau si anak, melalui tingkah laku mereka, telah mengubah terma-terma fasal 3, sehinggakan keperluan *"notis bertulis"* tersebut telah mereka ketepikan.

Diputuskan:

Oleh Peh Swee Chin HMP (menyampaikan penghakiman Mahkamah):

[1] Perjanjian 6 Oktober 1972 tidak tergulung kedalam kes-kes kecualian seperti yang dituturkan oleh s. 92(d) Akta Keterangan 1950. Oleh yang demikian, kedua-dua pihak berhak untuk merubah terma-terma perjanjian tersebut, secara bertulis, atau secara lisan di mana keterangan lisan tentang perubahan itu boleh diberikan.

[2] Di mana pengubahan secara tingkah laku hendak dibuktikan, ianya mestilah ditunjukkan bahawa bukan sahaja perubahan itu difahami oleh kedua-dua pihak tetapi juga bahawa pihak-pihak tersebut memang berniat untuk terikat dengannya. Perubahan terhadap fasal 3, dengan itu, hendaklah difahami oleh pembeli serta penjual, dan mereka juga mestilah berniat untuk terikat dengan perubahan tersebut.

[3] Perbezaan hendaklah dibuat di antara fakta yang dirumus secara spesifik dan fakta yang pada hakikatnya hanyalah merupakan andaian yang dibuat dari fakta yang dirumuskan secara spesifik. Berhubung dengan andaian daripada fakta yang dirumus secara spesifik, tribunal duluan yang membicarakan kes sesungguhnya tidak mempunyai apa-apa kelebihan untuk membuat keputusan dibandingkan dengan Hakim-hakim Mahkamah rayuan.

[4] Sekiranya si ibu memang benar-benar mengarahkan supaya si anak menahan pembayaran cek berkenaan pada 6 Oktober 1981, ia itu sehari selepas cek itu dikeluarkan, andaiannya adalah jelas bahawa beliau tidak mengizinkan si anak mengeluarkan cek itu. Dari fakta yang wujud, andaian juga boleh dibuat bahawa selepas si anak memberitahu si ibu tentang apa yang berlaku, si ibu tidak bersetuju dengan notis lisan yang diberikan sebagai ganti kepada 14 hari notis bertulis. Mahkamah dibawah jelas telah gagal memberi perhatian kepada andaian ini.

[5] Keterangan pada keseluruhannya lebih mungkin kepada si anak mengeluarkan cek pada 5 Oktober 1981, dan berikutnya berjumpa dengan kerani dan Peguam penjual tanpa terlebih dahulu berunding dengan si ibu.

Dan apabila rundingan dibuat dengan si ibu kemudiannya, si ibu enggan untuk terikat dengan perubahan terhadap fasal 3 dan dengan itu meminta si anak menahan pembayaran cek berkenaan pada keesokan harinya. Pembeli dengan itu memahami perubahan yang dimaksudkan oleh penjual tetapi enggan untuk terikat dengannya. Dengan itu tidak wujud *consensus ad idem* berhubung perubahan kepada fasal 3.

[6] Dengan tiadanya *consensus ad idem* pembeli masih boleh bergantung kepada fasal 3 dalam bentuk asalnya. Ianya mengikut bahawa tidak berlaku kemungkiran terhadap fasal ini, oleh kerana kewajipan untuk membayar tidak timbul sebelum notis bertulis seperti yang tertera dalam fasal itu diterima. Dalam keadaan sedemikian, Mahkamah di bawah adalah juga tersilap apabila memerintahkan kaveat pembeli dikeluarkan.

[7] Walaupun si anak boleh bertindak sebagai agen kepada si ibu, adalah mustahil untuk menetapkan sebagai proposisi undang-undang, bahawa seorang anak yang membuat sesuatu berhubung dengan hal ehwal ibu bapanya, semestinya akan mengikat ibu bapanya itu sebagai prinsipal. Walaupun begitu, pengeluaran cek berkenaan oleh si anak boleh menunjuk kepada keterangan *prima facie* suatu agensi sekiranya perbuatan itu disahkan oleh si ibu kemudiannya, samada secara bertulis atau melalui tingkah laku. Keterangan yang wujud di sini, bagaimanapun, menunjuk kepada keadaan sebaliknya.

[8] Di bawah s. 214 Kanun Tanah Negara, hanya keseluruhan tanah yang diberimilik, dan bukan sebahagian darinya, boleh dipindahmilik. Penjual, bagaimanapun, boleh memindahmilik kepentingan tak berbelahbagi bagi milikan lot 1493 mewakili kepentingan 1.5 ekar yang terangkum dalam lot 10 tersebut kepada pembeli, dan pada waktu yang sama memindahmilik bahagian selebihnya kepada dirinya. Dengan yang demikian, kepentingan tak berbelahbagi bagi lot 1493 yang dirangkumi oleh lot 10 bolehlah didaftarkan atas nama pembeli.

[Rayuan dibenarkan. Perintah untuk pelaksanaan spesifik perjanjian dan lain-lain relif berbangkit]

Cases referred to:
Montgomerie & Co. v. Wallace James [1904] AC 73 ***(foll)***
Benmax v. Austin Motor Co. Ltd. [1955] 2 WLR 418, HL ***(foll)***
Coronation Electronic Ltd. v. Lalchand Mahtani [1987] 1 MLJ 190 ***(refd)***
Cowey v. Liberian Operations Ltd. [1966] 2, Lloyd's Rep. 45 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92(d)

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - N.D. Krishna (Pretam Singh with him); M/s. Stanley, Ponniah, Ng & Soo.

JUDGMENT

Peh Swee Chin FCJ:

The appeal raises a short but interesting point as to the nature of the evidence required to prove consent to a variation of a term of an agreement, and a summary of relevant facts is given below, with first, an agreement dated 6 October 1972 but with only its relevant clauses, to be set out below:

Agreement

An agreement made this 6 October 1972 between Cheok Toh Gong, Nric No. 0237732 of 32 Main Road, Lukut, Port Dickson and Chok Yek Ann, Nric No. 3562361 of 2nd Mile Seremban Road, Port Dickson (hereinafter called the vendors) of the one part and Nalamah d/o Sangapillay, Nric No. 3020573 of Cheok Bau Tuan Building Site, 3½ Mile, Seremban Road, Port Dickson (hereinafter called the purchaser) of the other part.

Whereas by an option agreement entered into between Port Dickson-Lukut Rubber Estates Limited (hereinafter referred to as the said company) and Menjunjong Kebawah Duli Yang Maha Mulia, Yang Di Pertuan Besar Negri Sembilan of Istana Hinggap, Seremban dated 14 June 1972 (hereinafter referred to as the principal option agreement) the said Menjunjong Kebawah Duli Yang Maha Mulia, Yang Di Pertuan Besar Negri Sembilan had obtained an option to purchase from the said company the land situated in the Mukim of Port Dickson comprising total area of 56 acres 1 rood 20 poles more or less comprised in Lot 1493 being part of the land held under Certificate of Title No. 4007 (hereinafter referred to as the said land).

And whereas the principal option agreement is expressly subject to the company obtaining from the Estate Lands Board all such consents to this sale as shall be necessary and to the issue of a separate document of title in respect of Lot 1493.

And whereas by a deed of assignment entered into between the said Menjunjong Kebawah Duli Yang Maha Mulia, Yang Di Pertuan Besar Negri Sembilan and S Sathappan dated 26 June 1972, the said Menjunjong Kebawah Duli Yang Maha Mulia, Yang Di Pertuan Besar Negri Sembilan has assigned his rights title and interest in respect of the said land under the principal option agreement to the said S Sathappan.

And whereas by an agreement entered into between the said S Sathappan and the vendors dated 8 August 1972 the said vendors have agreed to purchase the said land.

And whereas the purchaser has inspected the documents mentioned in the recital above and is deemed to have notice thereof.

And whereas the vendors have agreed to sell and the purchaser to purchase a portion of the said land as is delineated in red on the plan annexed hereto (hereinafter referred to as the said portion of the said land) at the price of

RM6,000 per acre which said portion of the said land contains an area of 1.500 acres or thereabouts and is marked Temporary Lot No. 10, upon and subject to the terms and conditions hereinafter appearing.

Now it is agreed as follows:

1. In consideration of the sum of RM1,800 (Dollars One Thousand and Eight Hundred only) paid by the purchaser to the vendors by way of deposit being 20% of the purchase price (the receipt of which sum the vendors hereby acknowledge) and the sum of RM1,800 (Dollars One Thousand and Eight Hundred only) to be paid by the purchaser to the vendor's solicitors by way of additional deposit being a further 20% of the purchase price on or before 15 September 1972, the vendors agree to sell and the purchaser to purchase the said portion of the said land with vacant possession except as hereinafter mentioned subject to all conditions of title whether express or implied and all unregistered easements (if any) affecting the said portion of the said land but otherwise free from encumbrances for the purchase price and upon the terms and conditions hereinafter contained.

2. The purchase price of the said portion of the said land shall be the sum of RM9,000 (dollars Nine Thousand only) and the sums referred to in clause 1 hereof shall be treated as deposits on account of the purchase price.

3. The balance of the purchase price amounting to RM5,400 (Dollars Five Thousand and Four Hundred only) shall be paid by the purchaser to the vendors at the office of the vendor's solicitors Lee Boon Peng & Company, Seremban within 14 (fourteen) days of the date of receipt by the purchaser of a notice in writing from the vendors that the main title deed to the said land held under Lot No. 1493 has been issued (hereinafter referred to as the completion date).

4. Provided that the purchaser shall have paid to the vendors the said purchase price in full the vendors shall permit the purchaser to enter into possession of the said portion of the said land 7 (seven) days after the date of completion of the purchase.

5. If for any reason whatsoever other than by reason of the fault of the vendors the purchaser shall fail to pay the balance of the purchase price hereinbefore referred to pursuant to clause 3 hereof on or before the completion date this agreement shall automatically be terminated and all the purchaser's rights under it shall be ended and the said deposit and additional deposit referred to in clause 1 hereof shall be irrecoverable by the purchaser and immediately and without notice be forfeited to the vendors and shall be retained by and shall thenceforth belong to the vendors and shall not be refunded to the purchaser in any circumstances and the vendors shall be at liberty to sell or otherwise deal with the said portion of the said land at such price and in such manner and to such person or persons as the vendors may think fit and the vendors shall not be accountable to the purchaser for any profit made on such sale.

9. Provided that the balance of the purchase price pursuant to the terms of this agreement shall have been paid by the purchaser the vendors shall upon the issue of a qualified title to the said portion of the said land deliver to the

purchaser a valid and registrable transfer of the said portion of the said land free from encumbrances but subject to all conditions of title whether express or implied affecting the said portion of the said land in favour of the purchaser or his nominee or nominees and shall do or cause to be executed and done all such documents acts and things as may be necessary for effectually transferring to and vesting the said portion of the said land into the name of the purchaser or his nominee or nominees.

11. The vendors hereby undertake to apply to the Government for the subdivision of the said land into separate lots in accordance with the sketch plan annexed hereto and the costs of and incidental to the said application for subdivision up to and including the obtaining of a separate title or titles for the said portion of the said land including all legal expenses and fees or deposits payable to the Government and the cost of preparing all necessary plans shall be paid by the purchaser to the solicitors Lee Boon Peng & Company on the date of completion which monies shall be held in trust for the above mentioned fees of the subdivision of the said land.

14. Time shall be of the essence of this agreement.

It is to be borne in mind that clause 3 of the above agreement is at the heart of the matter in this appeal arising out of civil suit no 385/82 in the Court below. The vendors referred to in the above agreement are hereafter called vendors and the purchaser, the purchaser, the temporary lot No 10, lot 10. The purchaser had signed the above agreement herself.

There were two plaintiffs in the said civil suit in the beginning, the purchaser being the 1st plaintiff, and one Kathirvelu, allegedly a "sub-buyer' from the purchaser of ½ interest in lot 10 mentioned in the above agreement, the 2nd plaintiff. The 1st and 2nd defendants have been the vendors, the 3rd and 4th defendants, trustees for 5th defendant, to whom the vendors had sold lot 10 after the alleged breach of contract committed by the purchaser. The 3rd and 4th defendants were appointed as trustees for the 5th defendant, presumably because the titles pursuant to subdivision of the bigger land i.e. lot 1493 described in the above agreement have not been issued. The said Kathirvelu is hereafter called, the sub-buyer, and the 5th defendant, hereafter, the second purchaser.

The claims of the purchaser and the sub-buyer as plaintiffs in the civil suit concerned here have been for specific performance of the above agreement dated 6 October 1972 with the sub-buyer claiming as assignee of ½ of lot 10 and damages for breach in addition or in lieu etc. The claim of the sub-buyer specifically as against the defendants earlier had been struck out for having shown no cause of action by the Court below on 31 October 1990, from which there has not been any appeal.

The remaining plaintiff, i.e. the purchaser, claims, in addition, a further prayer that the trust deed dated 24 May 1982, in so far it relates to lot 10 being held in trust for the 2nd purchaser be declared null and void. The claim was heard as an action and was dismissed with costs, hence the present appeal before us concerned solely with the purchaser, and having nothing to do with the sub-buyer's claim. The purchaser, in the mean time, died in 1985, some 3 years after filing this action. The case was continued by his son, the present substituted plaintiff.

Reverting to clause 3, specifically, of the above agreement, we now go further into the evidence germane to this appeal.

By the time the said civil suit came up for hearing, the purchaser had died. The balance of the purchase price for the purchase of lot 10 was RM5,400 by October 1981, a month in which certain relevant incidents took place. The balance of the purchase price is hereafter called the said balance of price. Further there is a counterclaim from the defendants for the removal of a private caveat lodged by the purchaser, and more about it later.

Clause 3 bears repetition here and it requires a notice in writing from the vendors to the purchaser that the document of title to the bigger land (i.e. lot 1493) has been issued, and the purchaser is to pay the said balance of price within 14 days from the receipt of it, called the completion date therein, which is *viz*. on or before the last of the said 14 days.

On 5 October 1981, when the purchaser was still alive, somebody unexpectedly left a message in the house of the substituted plaintiff i.e. a son of the purchaser, (probably the house also of the purchaser), that the aforesaid document of title had been obtained. The said son of the purchaser got the message and seemingly all in a hurry, all in the same day, gave a cheque for RM5,000 (RM400 short of the said balance of price) to a clerk of the vendors. After giving the cheque, one of the vendors (i.e. the 1st defendant) took the said son (hereafter called the same way, i.e. the said son) to see the vendors' lawyer who told the said son that he was in the process of transferring the said document of title to the names of the vendors in respect of the said lot 1493, (the bigger lot). On the following day, the payment of the cheque which was given to the vendors by the said son the day before was stopped by the said son on 6 October 1981, the reason not being for lack of fund in his bank account as sufficiency of fund in the account was proved. He denied that his mother asked to pay on 5 October 1981 the said balance of price but that he paid it because of the message of a third party left at his house, (*vide* p. 81 of the appeal record). He denied he had breached clause 3 but that he stopped payment of the cheque because the said document of title was 'sedang proses pindahmilik" i.e. in the process of being transferred to the vendors, (p. 86 *ibid*). He said, (p. 87 *ibid*) that the vendors must send the notice in writing mentioned in the said clause 3 i.e. "Tapi mesti hantar notis bertulis." He said, (p. 89

ibid), that his mother (i.e. the purchaser) had asked him to stop payment of the cheque in question, because the purchaser wanted to pay through her solicitor. He had seen the lawyer of the vendors who told him as stated above while the vendors (through the said message) had said the said document of title had been obtained.

On 6 May 1982 the solicitors wrote to the vendors on behalf of the purchaser asking, *inter alia*, whether the said document of title for the said lot 1493 had been issued "pursuant to clause 3" of the sale and purchase agreement in respect of the said lot 10. No reply was given by the vendors to this letter. These facts were not disputed. It was not disputed that a remainder dated 26 July 1982 was sent by the same solicitors referring to the said letter dated 6 May 1982. The sub-buyer, through the same solicitors, had also sent the sum of RM5,000 (purportedly) as assignee of ½ interest in the said lot 10 from the purchaser. The said sub-buyer's cheque was returned by the vendors.

The learned trial Judge on the material parts of the evidence set out above, concluded that the purchaser was in breach of clause 3 by not paying the said balance of price of RM5,400 clearly and knowingly (terang dan sedar); because clearly and knowingly, she varied clause 3 of the said agreement dated 6 October 1972 by dispensing with (mengenepikan) the provision of written notice as provided in the said clause 3. We might just as well mention that the said civil suit was conducted and judgment written wholly in Bahasa Malaysia.

The conclusion was challenged before us as being erroneous, and it was the central issue, according to learned Counsel for the purchaser.

The said learned Counsel submitted to the effect that the said document of title to the said lot 1493 (the bigger lot) was issued in 1978, and a written notice in pursuance of clause 3 should have been sent. It was not. The said son came to know about the issue of the said document of title through a third party and he gave the cheque. He submitted further that "from the look of it", "the mother" (for the purchaser) was not consulted when the said son gave the cheque as it was common ground that the cheque was paid on the same day the said son received the message. To give an oral message that the said document of title had been issued, was not the same as giving the written notice giving 14 day's time. The messenger, (the sender of the said message), was not a donee of a deed of power of attorney of the vendors. Clause 3 was not fulfilled.

The gist of the submission of learned Counsel for the vendors and other defendants was that by issuing the cheque on the part of the said son, the purchaser varied the said clause 3 by doing away with the written notice. Payment of the said son's cheque was stopped because the said document of title for lot 1493 was suspected to be unissued. There was no request for the

written notice until the letter of the purchaser's letter dated 6 May 1982. He referred further to p. 86 of the appeal record about the evidence of the said son that he was told by the mother to stop payment because the purchaser wanted to pay through her solicitor.

In the light of the evidence and submissions highlighted above, this Court's duty would be to see whether the conclusion of his Lordship in the Court below could be sustained, i.e. that there was variation of the said clause 3, and that the purchaser was in breach of the said clause 3 as varied in the manner that both parties had agreed to accept the oral notice in place of written notice described in the said clause 3, *viz*. the oral message left in the house of the said son by someone on behalf of the vendors unexpectedly on 5 October 1981.

In the first place, both parties to an agreement are entitled to vary any term of the agreement, in writing, or orally, where oral evidence of such variation can of course be given, to quote s. 92(d) of the Evidence Act 1950, "save in cases in which the contract, grant or disposition of property is by law required to be writing, or has been registered according to the law in force for the time being as to registration of documents". The above agreement is not of those excepted cases.

It is important to remember that when it is sought to prove a variation, not by an express agreement, by a course of conduct, that both parties have understood the variation and intended to be bound by it. In the instant case, the variation in question was sought to be proved by a course of conduct, *vide* the evidence set out earlier, and the Court would have to be satisfied that the variation to clause 3 in question was both understood by the purchaser and the vendors, and that they all intended to be bound by it. What the Court would have to be so satisfied would depend on the surrounding circumstances.

The more weighty circumstances of this question are as follows. When the said son got to know the oral message, that the said document of title had been issued, he wrote out his cheque for RM5,000 and went to see the clerk and the lawyer of the vendors on the same day and all this shows considerable initiative and zeal of the said son. At that time the purchaser was still alive. It is not certain as to whether the said son, aged 62 at the time of giving evidence was staying with the mother. He told the Court that his mother had (afterwards) on or before the following day asked him to stop payment of the cheque and she wanted to pay the balance of price through her solicitors. This part of the evidence was not challenged. If the mother had asked the said son to stop payment on the cheque, and that was really done the next day i.e. on 6 October 1981, the clear inference is that she had not authorized the said son to issue the said cheque in the first place. The inference is strengthened by the issue of the cheque on 5 October 1981 and the hurry in which the said son went to see the clerk of the vendors and hence, the lawyer

of the vendors all on the same day, i.e. on 5 October 1981. It can be inferred that after the said son informed the purchaser i.e. his mother of what had happened, his mother disagreed with such oral notice to be in place of a 14 day's written notice, and asked him to stop payment on the cheque, and this even when the said son could have told her that the said document of title of the said lot 1493 had been available and was in the process of being transferred to the vendors. With great respect, the Court below had failed to apply its mind to these inferences, which would have arisen inevitably from the evidence, given the issue in hand at the trial.

Speaking of inferences from facts, it should be borne in mind that there is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found. Lord Halsbury LC's dictum in *Montgomerie & Co. v. Wallace James* [1904] AC 73, 75 in connection with such inferences from facts specifically found that "the original tribunal is in no better position to decide than the Judges of the Appellate Court", was again adopted with approval by the House of Lords in *Benmax v. Austin Motor Co. Ltd.,* [1955] 2 WLR 418, HL.

The fact that the said son who paid the cheque was the son of the purchaser seems, at the hearing, to have a great deal of assumed importance and requires some comment from us also.

It is certainly possible that the said son could act as agent for his mother, i.e. the purchaser. To lay down however as a proposition of law that a son, doing any act in connection with his parent's business, would bind his parent as principal would be too far off the mark. It all depends also on the circumstances proving or disproving agency, including hypothetically, e.g. a rather telling incident that the parent has held out his son earlier as his agent to a third party in question in connection with the contract in question. The issue of the cheque by the said son in this appeal is *prima facie* evidence of some agency and will be a fairly conclusive act of agency binding his mother if the said son's mother, i.e. the purchaser, has ratified it subsequently in writing or by conduct. However evidence in this case points to the contrary i.e. to a case of non-ratification or repudiation i.e. the evidence that the purchaser had told the son to stop payment of the cheque and that was done the next day and further that the solicitors had subsequently written on her instructions to enquire from the vendors if the said document of title had been issued "pursuant to clause 3".

It is to be borne in mind also that mere knowledge of a variation is not consent of a variation, per Chan Sek Keong JC (as he then was) in *Coronation Electronic Ltd. v. Lalchand Mahtani* [1987] 1 MLJ 190 at p. 197.

Thus in *Cowey v. Liberian Operations Ltd.* [1966] 2, Lloyd's Rep. 45, which can throw light on the nature of evidence required to prove consent to a variation of a term of agreement, the Court held there that it was not competent for a party to a contract to vary the terms of the contract just by passing out a circular or notice unilaterally to the other party. In that case plaintiff, an engineer, was engaged on the basis of a 3 months' notice of termination of service. About 3 months later after his employment, a circular was passed to all employees including the plaintiff for them to initial it. All employees including the plaintiff initialled it, and it had provided, *inter alia*, that their employment would be on a monthly basis unless otherwise agreed. Notwithstanding his initialling it, the Court gave judgment to the plaintiff holding, on an alternative but conclusive ground, that it was not competent for one party to vary it by passing such circular. By the way, because of the plaintiff initialling it, we are bound to say that the cited case is a borderline case.

In the light of the evidence analysed above, we hold more probably, that the said son had on 5 October 1981 issued the cheque in question, then visited the clerk of the vendors, and subsequently visited the vendors' lawyer without first consulting his mother, i.e. the purchaser, and we hold further that when the mother was consulted later that day after the visits, more probably she had refused to be bound by such variation of clause 3 and asked her son to stop payment on the cheque instead, on the following day.

We are of the view that the purchaser had understood the variation the vendors had in mind but she had not intended to be bound by it.

Consequently there was no *consensus ad idem* about the variation of clause 3 of the agreement, and the purchaser could still fall back on the said clause 3 in its original form and it goes without saying at the same time, that the purchaser had not been in breach of it, for the obligation to pay the said balance of price had not arisen prior to the receipt of the written notice as described in clause 3. This Court will make the necessary order to do justice between the parties later, for there remains another matter for disposal.

The defendants have counterclaimed an order for the removal of the purchaser's private caveat bearing Jilid No. 52, Folio 37 the date of 12 August 1982 and such order was granted by the Court below.

In consequence of our finding for the purchaser here and now, the order for the said removal of the said private caveat cannot stand.

In connection with any order this Court will make; up to the date of trial, no sub-divisional document of title had been issued in respect of lot 10 but the said document of title of the said lot 1493 of which the said lot 10 forms a part, had been registered in the names of the vendors. Under the sale and purchase agreement in question, the area of lot 10 is 1.5 acres so that any consequential order or direction for executing a registrable transfer of the said

lot 10 will refer to the 1.5 acres. It is envisaged that under s. 214 of the National Land Code, only the whole but not part only of any alienated land shall be capable of transfer, but the vendor can transfer an undivided share of the said document of title covering lot 1493 representing the said 1.5 acres of the said lot 10 to the purchaser and the rest of the said lot 1493 to themselves at the same time, so that the undivided share of lot 1493 in respect of lot 10 will be registered in the name of the purchaser. The fractional figure for the said undivided share representing the said lot 10 will be determined by consent of both parties, failing which, the Timbalan Pendafter of the High Court at Seremban will determine the same.

A few words also about the second purchaser i.e. the 5th defendant and his trustees i.e. 3rd and 4th defendants; they have all been represented by the same solicitors for the vendors i.e. the 1st and 2nd defendants. A common statement of defence was filed for all of them, in which there was not even an allegation that the 5th defendant was also a purchaser of the said lot 10 in good faith and for valuable consideration in answer to the allegation about the null and void declaration of trust by the 3rd and 4th defendants for the 5th defendant. Further the 5th defendant did not even give any evidence at all.

Finally, we allow the appeal, and the order of the Court below made on 14 July 1993 is hereby set aside with costs here and below and we further make an order:

(1) that the part of the deed of trust or declaration of trust made on 24 May 1982 in so far as it relates to the 5th defendant, in respect of grant for land 17067 for Lot No. 1493 Mukim of Port Dickson is hereby declared void and of no legal effect.

(2) that specific performance of the sale and purchase agreement dated 6 October 1972 in respect of 1.5 acres, as described by the parties therein be granted and carried out as follows;

(3) that the appellant do pay to the 1st and 2nd defendants within two weeks from the date hereof a sum of RM5,400 free of interest.

(4) that upon payment of the aforesaid RM5,400 and within 14 days thereafter; the 1st and 2nd defendants do execute a valid and registrable transfer in respect of 1.5 acres out of 56 acres, 1 rood and 20 poles comprised in Grant for Land No. 17067 (formerly known as Certification of Title No. 4007) for Lot No. 1493, Mukim of Port Dickson, that is to say, an undivided share of the said Lot 1493 representing 1.5 acres out of the said total area of 56 acres, 1 rood and 20 poles;

(5) that a fractional figure for such undivided share representing the said 1.5 acres be determined by the consent of the parties herein, in default, the same be settled by the Timbalan Pendafter of the High Court at Seremban, with an appeal therefrom to the Judge in Chambers pursuant to O. 56 of the Rules of the High Court 1980;

(6) that there be liberty to apply generally to this Court in connection with the implementation only of this order, when it is considered by any of the parties to be absolutely necessary; and

(7) that the respondents do pay costs, here and below.

Reported by W.A. Sharif